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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte OLAF ERIK ALEXANDER ISELE
and HOLGER BERUDA

Appeal 2009-003371
Application 09/446,550
Technology Center 3700

Decided: November 24, 2009

Before DONALD E. ADAMS, DEMETRA J. MILLS, and
STEPHEN WALSH, *Administrative Patent Judges*.

MILLS, *Administrative Patent Judge*

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134. The Examiner has rejected the claims for obviousness. We have jurisdiction under 35 U.S.C. § 6(b).

STATEMENT OF THE CASE

The following claim is representative:

1. Absorbent article comprising:
an absorbent core defining a core region comprising a core backsheet material;

a chassis region surrounding said core region comprising a chassis backsheet material;

whereby at least the core backsheet material comprises a laminate; said laminate comprising at least one polymeric layer comprising a vapour or gas permeable film material, and further comprising a fibrous layer positioned towards the outer side of the article during its intended use,

wherein the core backsheet material and the chassis backsheet material are each breathable and exhibit different degrees of breathability such that MVTR value of the core backsheet material is lower than that of the chassis backsheet material, as measured by calcium-chloride adsorbing moisture through each of said materials under an outside relative humidity of about 75 % at a temperature of about 40 °C, wherein said polymeric layer comprises a polymeric matrix and particulate filler material embedded in said polymeric matrix and wherein said breathability of said core backsheet material is provided by cracks formed around said particulate filler material, wherein at least a portion of said cracks is formed by passing said laminate through at least one roll pair, said roll pair comprising engaging ridges and grooves which apply a multiplicity of corrugations to at least a portion of said laminate.

The Examiner relies on the following evidence:

Dobrin	US 5,628,737	May 13, 1997
Wu	US 5,865,926	Feb.2, 1999

Grounds of Rejection

Claims 1-15 and 21-25 are rejected under 35 U.S.C. §103(a) as being unpatentable over Dobrin and Wu (Ans. 3).

FINDINGS OF FACT ("FF")

1. "Dobrin discloses all aspects of the claimed invention with the exception of a particulate filler material imbedded in the polymeric film layer. Dobrin discloses an absorbent article 20, as shown in figure 2, comprising a core region 74, and a chassis region 76 surrounding the core region 74. The article 20 further comprises a laminate 95, as shown in figure 3, which extends into both the core region 74 and the chassis region 76 to form a core backsheet and a chassis backsheet. The laminate 95 comprises a polymeric film layer 26, as described in column 6, lines 42-43, and a fibrous layer 90, as described in column 9, lines 51-52. The laminate 95 is a breathable, unitary layer. The laminate 95 comprises apertures 84 in the chassis region 76, giving the chassis region 76 a higher degree of breathability than the core region 74, and therefore the MVTR value of the core region 74 is lower than that of the chassis region 76." (Ans. 3.)

2. "Wu discloses a breathable laminate for use in an absorbent article, as disclosed in column 4, lines 37-42, comprising a polymeric film layer and a fibrous layer, as described in column 2, lines 60-64. The polymeric film comprises a polymeric matrix and a particulate filler material, as disclosed in column 3, lines 2-17. The breathability of the laminate is enhanced by the formation of cracks around the particulate filler material, as disclosed in column 3, lines 19-21. The laminate is passed through a pair of rolls comprising ridges and grooves which provides a multiplicity of corrugations

to the laminate, as disclosed in column 4, lines 51 -65, and shown in figure 2" (Ans. 3-4).

3. The Examiner finds that "[i]t would therefore be obvious to one of ordinary skill in the art at the time of invention to construct the laminate of Dobrin using the polymeric film layer of Wu to increase the breathability of the laminate" (*Id.* at 4).

4. Dobrin acknowledges that vapor permeable backsheets provide improvements over impermeable backsheets. (Dobrin, col. 1, ll. 46-56.)

PRINCIPLES OF LAW

"In rejecting claims under 35 U.S.C. § 103, the examiner bears the initial burden of presenting a *prima facie* case of obviousness. Only if that burden is met, does the burden of coming forward with evidence or argument shift to the applicant." *In re Rijckaert*, 9 F.3d 1531, 1532 (Fed. Cir. 1993) (citations omitted). In order to determine whether a prima facie case of obviousness has been established, we considered the factors set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 17 (1966): (1) the scope and content of the prior art; (2) the differences between the prior art and the claims at issue; (3) the level of ordinary skill in the relevant art; and (4) objective evidence of nonobviousness, if present.

"[O]bviousness requires a suggestion of all limitations in a claim." *CFMT, Inc. v. Yieldup Intern. Corp.*, 349 F.3d 1333, 1342 (Fed. Cir. 2003) (citing *In re Royka*, 490 F.2d 981, 985 (CCPA 1974)).

To establish prima facie obviousness of a claimed invention, there must be a reasonable expectation of success. *In re Merck & Co., Inc.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). This reasonable expectation

of success must be found in the prior art, and not based on the Applicant's disclosure. *In re Vaeck*, 947 F.2d 488, 20 USPQ2d 1438 (Fed. Cir. 1991).

"[W]hen a prima facie case is made, the burden shifts to the applicant to come forward with evidence and/or argument supporting patentability." *In re Glaug,* 283 F.3d 1335, 1338 (Fed. Cir. 2002). Rebuttal evidence is "merely a showing of facts supporting the opposite conclusion." *In re Piasecki,* 745 F.2d 1468, 1472 (Fed. Cir. 1984).

> A reference may be said to teach away when a person of ordinary skill, upon reading the reference, would be discouraged from following the path set out in the reference, or would be led in a direction divergent from the path that was taken by the applicant. The degree of teaching away will of course depend on the particular facts; in general, a reference will teach away if it suggests that the line of development flowing from the reference's disclosure is unlikely to be productive of the result sought by the applicant.

In re Gurley, 27 F.3d 551, 553 (Fed. Cir. 1994).

"The fact that the motivating benefit comes at the expense of another benefit … should not nullify its use as a basis to modify the disclosure of one reference with the teachings of another. Instead, the benefits, both lost and gained, should be weighed against one another." *Medichem S.A. v. Rolabo S.L.,* 437 F.3d 1157, 1165 (Fed. Cir. 2006).

"An assertion of what seems to follow from common experience is just attorney argument and not the kind of factual evidence that is required to rebut a *prima facie* case of obviousness." *In re Geisler*, 116 F.3d 1465, 1470 (Fed. Cir. 1997).

ISSUE

The Examiner argues "[i]t would therefore be obvious to one of ordinary skill in the art at the time of invention to construct the laminate of Dobrin using the polymeric film layer of Wu to increase the breathability of the laminate" (Ans.4).

Appellants contend that the Dobrin reference discredits the embodiments of the Wu reference. "This discreditation creates a conflict between the Dobrin reference and the Wu reference" (App. Br. 9). Appellants argue that "[a]s a result, it would not have been obvious to modify the backsheet of the diaper of the Dobrin reference with the method of making a microporous laminate from the Wu reference." (*Id.*)

Appellants further argue that:

> To create a backsheet with overall breathability (described in the Wu reference) and with regions of apertures (described in the Dobrin reference), as cited in the last Office Action, would require a first process for forming the (Dobrin) apertures and a second process for forming the (Wu) micropores. From the Applicant's review, there appears to be no mention in the Wu reference that a film with apertures, as described in Dobrin, can be processed to add micropores. Similarly, there appears to be no reference in the Dobrin reference that a film with micropores, as described in Wu, can be processed to add apertures.

(*Id.*)

The issue is: Have Appellants demonstrated error in the Examiner's obviousness rejection and does the prior art create a reasonable expectation of success?

ANALYSIS

Appellants contend that the Dobrin reference discredits the embodiments of the Wu reference. (*Id.*)

In response to the Appellants argument that the Dobrin reference discredits all prior art vapor permeable liquid impermeable backsheets, and therefore it would not have been obvious to modify the article of Dobrin with the backsheet film of Wu the Examiner finds that:

> Dobrin's disclosure in column 1, lines 47-50, is directed towards the prior art backsheets disclosed above in column 1, lines 31-46. None of the backsheet films disclosed by the prior art discussed by Dobrin, including the microporous film disclosed in U.S. Pat. No. 3,156,242, are equivalent in structure to the backsheet film taught by Wu. The backsheet film taught by Wu is a microporous film comprising a thermoplastic polymer and a pore-forming particulate filler, which offers the advantage of a film that is breathable while maintaining its liquid-barrier properties. None of the prior art cited by Dobrin in column 1, lines 31-46, disclose the backsheet film taught by Wu, and therefore Dobrin does not discredit, or teach away from, using the film of Wu as a backsheet for an absorbent article.

(Ans. 6.)

We find that the Examiner has the better argument and essentially agree with the Examiner's statement of the rejection and response to Appellants' argument set forth in the Answer. Moreover, Dobrin acknowledges that vapor permeable backsheets (such as those of Wu) provide improvements over impermeable backsheets (Dobrin, col. 1, ll. 46-56), providing motivation to one of ordinary skill in the art to use them. It is well settled that the fact that the motivating benefit (in this case vapor permeability) comes at the expense of another benefit (ease or expense of manufacture) should not nullify its use as a basis to modify the disclosure of

one reference with the teachings of another. *Medichem S.A. v. Rolabo S.L.*, 437 F.3d 1157, 1165 (Fed. Cir. 2006). Therefore, we find no teaching away or full discreditation of Wu by Dobrin, as argued by Appellants.

Appellants argue that there appears to be no reference in Dobrin that a film with micropores, as described in Wu, can be processed to add aperatures. (App. Br. 9.)

In response, the Examiner finds that:

> In response to the Appellant's [sic] argument that there appears to be no mention in the Wu reference that a film with apertures, as described in Dobrin, can be processed to add micropores… that Wu is employed as a teaching reference to provide a microporous film for the advantage of adding breathability while maintaining liquid barrier properties. The backsheet of Dobrin is being modified, in light of the teaching of Wu, to include a microporous film. Dobrin discloses the backsheet film is apertured in its outer regions. Wu need not teach providing the microporous film with apertures, or provided an apertured film with micropores. The backsheet of Dobrin, as modified by Wu, will comprise a microporous film that is apertured in its outer regions.

(Ans. 6-7.) We agree with the Examiner and do not find that Appellants have provided rebuttal evidence that a film with micropores, as described in Wu, cannot be processed to add apertures, as in Dobrin.

Appellants argue that the Examiner has provided no evidence to support a reasonable expectation of success. (App. Br. 10.)

In response to the Appellants argument that there appears to be no reasonable expectation of success for forming apertures in the microporous film of Wu, the Examiner finds that the inclusion of a particulate filler and micropores does not prevent a film from being capable of having apertures formed therein. (Ans. 7.) Furthermore, Appellants have provided no

evidence that the inclusion of a particulate filler and micropores prevents a film from being capable of having apertures formed therein. "An assertion of what seems to follow from common experience is just attorney argument and not the kind of factual evidence that is required to rebut a *prima facie* case of obviousness." *In re Geisler*, 116 F.3d 1465, 1470 (Fed. Cir. 1997)(emphasis added).

The Examiner finds that "Wu discloses a formed film of thermoplastic polymers that is sufficiently thin for used in an absorbent article, and therefore is fully capable of being apertured" (Ans. 7). Appellants have provided no rebuttal evidence, thus we are persuaded by the Examiner's position.

CONCLUSION OF LAW

Appellants have not demonstrated error in the Examiner's obviousness rejection and have not presented evidence to support lack of a reasonable expectation of success. The obviousness rejection is affirmed.

TIME PERIOD

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED

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